

FILED IN THE
U.S. DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

Oct 11, 2022

SEAN F. McAVOY, CLERK

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

ROUND LAKE FARMS, LLC, a
Washington limited liability company,
Plaintiff,
v.
THE UNITED STATES OF AMERICA,
Defendant.

No. 2:21-CV-00354-SAB

**ORDER GRANTING
DEFENDANT’S MOTION TO
DISMISS**

Before the Court is Defendant’s Motion to Dismiss, ECF No. 21. The motion was heard without oral argument. Defendant is represented by Derek Taylor and Molly Smith. Plaintiff is represented by Garrett Kitamura and Norman Semanko.

Plaintiff filed its Complaint seeking damages for alleged harm caused from a conservation planning program overseen by the Natural Resource Conservation Service (“NRCS”), an agency within the United States Department of Agriculture (“USDA”). Plaintiff alleges the program run by NRCS enabled unlawful construction of wetland conservation sites that impaired Plaintiff’s downstream senior water rights, and consequently harmed Plaintiff’s crop operation. Specifically, Plaintiff argues NRCS was required to obtain the necessary water permits before providing assistance in creating the wetlands. Plaintiff is bringing its suit under the Federal Torts Claim Act (“FTCA”).

1 Defendant moves to dismiss the First Amended Complaint, asserting the
2 Court does not have subject matter jurisdiction to hear this the action because the
3 United States has not waived its sovereign immunity to be sued for the claims
4 being brought by Plaintiff.

5 **Motion Standard**

6 A defendant may seek dismissal of an action for lack of subject matter
7 jurisdiction under Federal Rule of Civil Procedure 12(b)(1). Plaintiff has the
8 burden of proving jurisdiction when such a motion is made. *Chandler v. State*
9 *Farm Mut. Auto Ins. Co.*, 598 F.3d 1115, 1122 (9th Cir. 2010). If the defendant
10 raises a factual challenge to a court’s jurisdiction, as opposed to a facial challenge
11 based solely on the allegations in the complaint, a court may consider matters
12 outside the pleadings in ruling on the motion. *Roberts v. Corrothers*, 812 F.2d
13 1173, 1177-78 (9th Cir. 1987). “[N]o presumptive truthfulness attaches to
14 plaintiff’s allegations, and the existence of disputed material facts will not preclude
15 the trial court from evaluating for itself the merits of jurisdictional claims.” *Id.*
16 Thus, a court may “hear evidence regarding jurisdiction and resolve factual
17 disputes where necessary when determining such a motion.” *Id.*

18 **Sovereign Immunity**

19 The United States has sovereign immunity and cannot be sued without its
20 consent. *Lam v. United States*, 979 F.3d 665, 671 (9th Cir. 2020). The Federal Tort
21 Claims Act (“FTCA”) provides such consent, in certain situations. *Id.* The FTCA
22 permits private suits against the United States for damages for loss of property,
23 injury, or death caused by its employee’s negligence. *Id.* (citation omitted).
24 Liability arises for these acts if a private person would be liable to the claimant
25 under the law of the place where the act or omission occurred. *Id.* Such acts are
26 typically “ordinary common-law torts.” *Id.* (citation omitted). The United States
27 can be held liable in tort “in the same manner and to the same extent as a private
28 individual under like circumstances.” 28 U.S.C. § 2674. This has been referred to

1 as the “private analog” requirement. *Firebugh Canal Water Dist. v. United States*,
 2 712 F.3d 1296, 1303 (9th Cir. 2013).

3 The discretionary function exception is an important exception to the FTCA.
 4 Under this exception, the United States does not waive immunity for tort claims if
 5 the alleged tortfeasor was performing a discretionary function or duty when they
 6 injured the plaintiff. 28 U.S.C. § 2680(a).¹ This is true even if the employee abused
 7 that discretion. *Lam*, 976 F.3d at 672. Thus, where the discretionary function
 8 exception applies, the United States has not waived its sovereign immunity, and
 9 the court lacks subject matter jurisdiction over a plaintiff’s claim. *Id.*

10 **Plaintiff’s First Amended Complaint**

11 Plaintiff is a Washington limited liability company based out of Soap Lake,
 12 Washington. Plaintiff is a producer and distributor of hay. It uses Round Lake
 13 water to irrigate about 840 acres of hay located directly south of the lake. Plaintiff
 14 has a water rights certificate and claim under state law to use the Round Lake
 15 water with priority dates between 1912 and 1976. Round Lake is a natural lake, at
 16 least 57 ft. deep, that is part of the Crab Creek Flow System and is connected to the
 17 creek through a shallow side channel. The relevant portion of Crab Creek flows
 18 from east to west, running roughly adjacent to Washington State Route 28.²

20 ¹ 28 U.S.C. § 2680(a) provides that the United States does not waive its sovereign
 21 immunity for:

22 Any claim based upon an act or omission of an employee of the
 23 government, exercising due care, in the execution of a statute or regulation,
 24 whether or not such statute or regulation be valid, or based upon the
 25 exercise or performance or the failure to exercise or perform a discretionary
 function or duty on the part of a federal agency or an employee of the
 government, whether or not the discretion involved be abused.

26 ²Crab Creek is a relatively small surface water stream in the Columbia Basin of
 27 central Washington, flowing generally from east to west. Upper Crab Creek runs
 28 from the creek’s source in the Columbia River Plateau to Potholes Reservoir, south

1 Plaintiff relies on the Crab Creek Flow System³ to transport water from the
2 upper Crab Creek and replenish Round Lake. Historically, the flow system
3 combined with the water storage capacity of Round Lake has been a reliable source
4 of water for Plaintiff to exercise its water rights and sufficiently irrigate its hay
5 crops.

6 Plaintiff alleges that pursuant to the Wetland Reserve Program (WRP)⁴, the
7 NRCS provided permanent easements to eight entities, and provided permitting,
8

9 of Moses Lake, Washington. Lower Crab Creek runs from Potholes Reservoir to
10 the Columbia River. Round Lake is located in the Upper Crab Creek portion of the
11 watershed.

12 ³According to Plaintiff, the Crab Creek Flow System undergoes an annual cycle
13 that enables Round Lake to serve as an effective water storage reservoir:

14 a. In the fall and winter months, Crab Creek is dry and has minimal flow in
15 the vicinity of Round Lake;

16 b. In the spring months, runoff in the Crab Creek watershed upstream of
17 Round Lake produces a freshet or flood with corresponding peak flows. The
18 freshet produces sufficient flow to rewet the creek and fill Round Lake.

19 c. In the summer months, the Crab Creek Flow System rapidly declines,
20 often resulting in the reach of the creek adjacent to Round Lake to go dry.
21 As a result of this cycle, the lake is disconnected from the flow system much of the
22 year, but still brimming with the water that flowed into the lake during the spring
23 freshet.

24 ⁴The Wetlands Reserve Program (WRP) is a voluntary program in which private
25 landowners receive financial and technical assistance from the NRCS for the
26 purpose of preserving, enhancing, and restoring wetland environments on private
27 property. The private landowner retains ownership of the property but must sign a
28 permanent or long-term easement.

1 funding, and design assistance for wetland projects, including construction
2 activities such as dikes and ponds. Plaintiff alleges that as a direct consequence of
3 WRP projects, farmland on the upper Crab Creek became wetlands, retaining Crab
4 Creek Flow System water and diminishing the spring freshet that is essential to
5 annual replenishment of Round Lake. Because of this, Plaintiff is unable to utilize
6 its senior water rights.

7 Plaintiff alleges that water flowed into the conservation projects and became
8 stored surface water (behind a dike or in pond), wetlands, and groundwater
9 recharge, which caused Crab Creek to be dry at the inlet to Round Lake for the
10 entire 2020 water year. As a result, Plaintiff was forced to purchase emergency
11 water from the East Columbia Basin Irrigation District and was forced to operate
12 with a limited water supply for approximately one month while waiting on a
13 decision for emergency water, which substantially affected the 2020 hay fields.
14 The same thing happened in 2021.

15 Plaintiff is asserting three claims: (1) negligence; (2) trespass; (3) public
16 nuisance; and (4) private nuisance.

17 **(1) Negligence**

18 Plaintiff alleges that Defendant owed Plaintiff a legal duty to abide by the
19 rules and procedures applicable to agency actions and specifically, section 610.13
20 of the National Environmental Compliance Handbook imposes a duty upon NRCS
21 to comport with state requirements in the course of carrying out the Wetland
22 Reserves Program.

23 Plaintiff alleges: (1) under Wash. Rev. Code 90.03.370, NRCS was required
24 to obtain an Ecology reservoir permit prior to construction of the Crab Creek
25 Projects, and it failed to do so; (2) under Wash. Rev. Code 90.03.350, NRCS was
26 required to obtain an Ecology dam safety permit prior to construction the dikes
27 associated with Crab Creek Projects, and it failed to do so; and (3) under Wash.
28 Rev. Code 90.03.010, NRCS was required to obtain a state water right permit prior

1 to diverting or using any amount of surface water for the Crab Creek Projects, and
2 it failed to do so.

3 Plaintiff alleges that in failing to obtain the necessary permits, NRCS
4 violated state water law and breached its own specific mandatory directives. Also,
5 the noncompliant Crab Creek Projects led to a decrease in downstream waterflow
6 to Round Lake, depriving Plaintiff of the ability to use its senior water rights to
7 irrigate its hay crop.

8 **(2) Trespass**

9 Plaintiff alleges that through implementation of the Crab Creek Projects, the
10 NRCS effectively entered upon Plaintiff's land by changing the flow of the Crab
11 Creek Water System in a manner that directly encroached upon Plaintiff's senior
12 water rights in Round Lake. Plaintiff alleges that NRCS's failure to obtain the
13 necessary state water permits for the Crab Creek Projects made the changes to the
14 Crab Creek waterflow inherently unreasonable, and NRCS knew or should have
15 known that it did not have approval from Plaintiff to intrude on Plaintiff's water
16 rights. Plaintiff alleged that NRCS's intrusion harmed Plaintiff's senior water
17 rights and associated property.

18 **(3) Public Nuisance**

19 Plaintiff alleges that by funding and approving the creation of dikes in
20 furtherance of the Crab Creek Projects, the NRCS interfered with both Crab Creek
21 and Round Lake, in violation of Wash. Rev. Code 90.03.350 and Wash. Rev. Code
22 9.66.010.

23 **(4) Private Nuisance**

24 Plaintiff alleges that the actions or omissions by employees of the United
25 States constitute a public nuisance under the laws of the State of Washington.

26 **(5) Requested Relief**

27 Plaintiff is seeking \$399,351.45 in damages and asking the Court to require
28 that the NRCS's wetlands projects be removed, or that the United States otherwise

1 mitigate the impact of Plaintiff's water rights or compensate Plaintiff for the
2 ongoing injury and damages.

3 **Defendant's Motion**

4 In its motion, Defendant submitted declarations from Roylene M. Comes At
5 Night, ECF No. 24, and Kevin Brown, ECF No. 23. Ms. Comes At Night is a state
6 conservationist with NRCS. She opined there is no evidence that the NRCS WRP
7 easements executed in the early 2000s that are restoring the Crab Creek wetland
8 systems are impacting Plaintiff's water rights.

9 Kevin Brown is the Columbia Basin Watermaster for the Washington State
10 Department of Ecology. Mr. Brown stated that water from Crab Creek only
11 contributes to Round Lake when the Crab Creek is at a high flow stage. Based on
12 his personal observations, Crab Creek's natural flow does not reach the volume
13 needed to contribute to Round Lake on an annual basis.

14 Defendant also submitted a Communications Plan concerning Round Lake
15 that apparently was created by the Department of Ecology. ECF No. 22, Ex. A.
16 This document states that Plaintiff has alleged that USDA helped fund several
17 wetland restoration projects without obtaining required states permits from
18 Ecology and these wetland projects are now impairing water rights for irrigation. It
19 stated that Ecology has records that Round Lake has a history of insufficient water
20 from Crab Creek to fill the lake annually that date back to the early 1900s.
21 Additional, Ecology investigated the claim of impairment of water rights and did
22 not find conditions that could be elevated to regulation. Ecology declined to take
23 enforcement actions associated with Plaintiff's complaints.

24 The document also stated that the wetlands restoration project was a federal
25 project that required a nation-wide permit (NWP) from the Corps of Engineers.
26 The Corps NWP permit had conditions that were adhered to. Ecology reviewed the
27 permit, and waived its authority to further condition the permit, which is typical
28 practice for many wetlands restoration projects.

1 Defendant argues the discretionary function exception to the FTCA applies
2 and bars Plaintiff's claims. It also argues that regardless, NRCS did not violate any
3 statute or regulation because the Department of Ecology has determined that
4 NRCS did not violate the statutes identified by Plaintiff. It maintains that the
5 Department of Ecology is the exclusive enforcement authority for Wash. Rev.
6 Code 90.03. Consequently, Plaintiff does not have a private right of action to
7 enforce any violations.

8 Defendant asserts that the failure to comply with Washington's water
9 permitting scheme does not create a legal basis for FTCA liability. Because a
10 private party could not be liable in tort to another individual for violation of the
11 water code, the United States cannot be held liable under the FTCA.

12 Analysis

13 The activities undertaken by NRCS pursuant to the WRP identified in
14 Plaintiff's Complaint, including the permitting, funding, and design assistance for
15 wetland projects, are clearly the type of activities that are exempted from tort
16 liability under the FTCA. Plaintiff seemingly recognizes this because it is not
17 asserting liability based on these activities. Rather, Plaintiff argues that NRCS was
18 required to obtain water permits for the projects but failed to do so. The problem
19 with this theory is that a private party cannot sue another private party for failure to
20 obtain water permits. That responsibility and authority lies solely with the
21 Department of Ecology.

22 The FTCA only permits actions against the United States "in the same
23 manner and to the same extent as a private individual under like circumstances." §
24 2674. Because Plaintiff's claims do not meet the "private analog" requirement, the
25 Court does not have subject matter jurisdiction over Plaintiff's First Amended
26 Complaint.

27 //

28 //

Accordingly, **IT IS HEREBY ORDERED:**

1. Defendant's Motion to Dismiss, ECF No. 21, is **GRANTED**.
2. The above-captioned case is **DISMISSED**.
3. Plaintiff's Motion for Summary Judgment, ECF No. 29, is **DENIED**, as moot.
4. Defendant's Motion to Stay Summary Judgment Briefing Schedule, ECF No. 30, is **DENIED**, as moot.
5. Defendant's Motion to Expedite, ECF No. 31, is **DENIED**, as moot.
6. The Clerk of Court is directed to enter judgment in favor of Defendant and against Plaintiff.

IT IS SO ORDERED. The Clerk of Court is directed to enter this Order, forward copies to counsel, and **close** the file.

DATED this 11th day of October 2022.



Stanley A. Bastian

Stanley A. Bastian
Chief United States District Judge